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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 961

CALVIN KOVENS and LEON COHEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

W. G. WARD
1240 duPont Building
Miami 32, Florida
Attorney for Petitioner Kovens

IRWIN J. BLOCK
11th Floor Dade Federal Building
Miami 32, Florida
Attorney for Petitioner Cohen

CHESTER BEDELL
1520 Barnett National Bank Building
Jacksonville, Florida 32202
Attorney for Petitioners

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Calvin Kovens and Leon Cohen, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on November 27, 1964.

Citation to Opinion Below.

The opinion delivered in the court of appeals for the fifth circuit by Chief Judge Tuttle, concurred in by Circuit

Judges Jones and Gewin, is officially reported at 338 F. 2d 611 and is printed in the appendix hereto.

Jurisdiction.

1. The judgment of the court of appeals sought to be reviewed was dated and entered November 27, 1964.

2. Petitioners' timely petition for rehearing was denied by the court of appeals by order dated February 4, 1965. No extension of time to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

Questions Presented.

1. Upon the trial of charges that petitioners conspired to make and that Kovens made and Cohen caused to be made false statements knowingly and wilfully for the purpose of influencing a Federal Savings and Loan Association in advancing funds pursuant to a construction loan agreement (allegedly violating Title 18 U. S. C. § 1014), were petitioners entitled to introduce evidence showing that they dealt with the Association in good faith and that neither they nor the Association officials, in routinely using the printed forms containing the alleged false statements, considered those forms as having the meaning attributed to them by the prosecution?

2. Upon such a trial, is it error for the trial judge to instruct the jury that, "unless the contrary appears from the evidence," the jury could infer that petitioners intended all the consequences of their acts?

Statutes Involved.

The federal statutes involved are Title 18 U.S.C. § 1014, which provides in relevant part that:

> "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . a Federal Savings and Loan Association . . . upon any application, advance . . . or loan . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both."
>
> Title 18 U.S.C. § 1014,

and Title 18 U.S.C. § 371, which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> Title 18 U.S.C. § 371.

Statement.

In 1958 Miami Beach Federal Savings and Loan Association agreed to lend $742,000 to Ruedd, Inc., to finance the construction of a shopping center on Ruedd, Inc.'s land by Cal Kovens Construction Corp., of which petitioners Kovens and Cohen were president and secretary, respectively. The arrangements were generally that the net loan proceeds of approximatly $700,000, together with $300,000 to be provided by the owner (being the difference between the loan proceeds and the construction contract

price), would be deposited in escrow and disbursed as construction progressed by means of draws made by the Association at the request of the contractor.

In six counts of the indictment it was charged that on three occasions, in violation of Title 18 U.S.C. § 1014, Kovens made and Cohen caused to be made a false statement knowingly and wilfully "for the purpose of influencing the action of the Miami Beach Federal Savings and Loan Association . . . in advancing funds," in that they submitted and caused to be submitted three construction draws

> "requesting payment of the sum of [$149,946.86 on December 8, 1958; $149,537.84 on January 9, 1959; $353,759.82 on February 23, 1959] from funds held in escrow by the said Miami Beach Federal Savings and Loan Association for the said Ruedd, Inc. pursuant to the terms of the said Construction Loan Agreement, and certifying that the funds enumerated in the said Construction Draw and itemized on the reverse side thereof had been expended for the sole purpose of constructing the improvement on the property described therein, whereas in truth and in fact as [petitioners] well knew, the said Construction Draw was false in that the entire amount of the funds enumerated in the said Construction Draw and itemized on the reverse side thereof was not expended for the sole purpose of constructing the improvement on the property described therein. . . ."
>
> Counts 1, 2, 3, 6, 7, 8; R. 4-12.

In Count 10 of the indictment it was charged that petitioners conspired, in violation of Title 18 U.S.C. § 371, to make false statements to the Association in violation of § 1014.

As part of the routine procedure for drawing down the escrow funds as construction progressed, Cal Kovens

Construction Corp. submitted to the Association a number of printed forms of the Association entitled "Construction Draw," each of which requested payment of a certain amount of the funds in escrow. The draws that were the subject of the indictment (Government's Exhs. 19, 21, 22; R. 880, 885, 889) were prepared by Cohen and the office staff (R. 587). In determining the appropriate amount of each such draw, they took into consideration

> "the amount of money that has been paid to sub-contractors, the amount of money that will be paid to subcontractors, unpaid bills that are in the file, conferences that I or other estimators may have with various sub-contractors and anticipating their billing for work that had already been done and also reports from the field from engineers working for the company, estimators working for the company, expediters working for the company who turn in reports to the office, telling us how much work has been done in the field, and also by sometimes, a lot of times, by my own visual inspection of the job and discussions with the superintendent on the job."
>
> R. 587.

The construction draw dated December 8, 1958 (Government's Exh. 19, R. 880), which in form is representative of the others, recited:

> "To: Miami Beach Federal Savings and Loan Association: Draw in the sum of One Hundred Forty-nine Thousand Nine Hundred Forty-six & 86/100 ($149,946.86) Dollars is hereby requested on the Construction Escrow funds of Ruedd, Inc., deposited with the Association to cover the construction of the improvement on the following described property..."

The amount requested by the draw was inserted also in the form of affidavit which appears as part of the same document, in this way:

> "That the funds requested in the sum of One Hundred Forty-nine Thousand, Nine Hundred Forty-six & 86/100 ($.....) Dollars, enumerated in the draw above and itemized on the reverse side hereof have been expended for the sole purpose of constructing the improvement on the following described property. . . ."
>
> R. 880.

The proofs show that none of the construction draws submitted contained an itemization of the funds requested or of a prior expenditure of an amount equal to the funds requested.* But, as part of the routine handling of the construction draws, the contractor also submitted, at or about the time each draw was submitted, a paper called "requisition" (R. 882, 887, 981), which classified the total construction into various "items" such as "concrete" and "lumber" and showed what part of the total sum sought to be drawn was requisitioned for each part of the total construction effort. The contractor also submitted several printed forms executed by or on behalf of various subcontractors (Government's Exhs. 1, 3, 5, 6, 7, 10, 11, 13, 15, 22B; R. 841, 844, 847, 848, 850, 854, 855, 858, 861, 893-98), by which the subcontractors waived or released any lien they might have had on the property in consideration of the payment of a stated sum, the receipt of which was thereby acknowledged.

It was the theory of the prosecution that Kovens and Cohen, in submitting each draw document, intended to represent and thereby represented to the Association that the contractor had theretofore paid in cash, to each subcontractor in whose name a waiver or release of lien was submitted, the full amount receipted for in that waiver

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* Sometime after the draws were submitted, an employee of the Association wrote on the back of each draw (R. 880, 885, 889) a reference to a "schedule attached," which was not attached to the draw when it was submitted (R. 406-07, 422, 427).

or release of lien or, in the case of a subcontractor who waived his lien "in consideration of the payment of the sum of One Dollar ($1.00), the receipt whereof is hereby acknowledged, and other valuable consideration, and benefits to the undersigned accruing" (R. 896), the full amount listed in the requisition paper opposite the item of work that that subcontractor was engaged in. Thus, the Government contended that petitioners falsely stated to the Association, by submitting each construction draw, that an amount equal to the sum sought to be drawn had previously been paid to subcontractors as purportedly itemized in the requisition document or in the releases or waivers of lien. In fact, petitioners had no idea of making such a representation. The amounts requested in the draws were based not simply on what had been paid to subcontractors but also upon the value of work and materials which had then been incorporated in the job by subcontractors and also by the contractor itself, with its own employees (R. 587).

In the course of the trial, petitioners sought repeatedly to correct the prosecution's erroneous premise that the escrow funds were not to be disbursed by the Association except upon a showing by the contractor that sums of money aggregating the amount of each draw had been paid in cash, at the time of the draw, to the subcontractors and materialmen whose work was then incorporated in the job. In truth, the funds were to be disbursed in accordance with the usual practices followed in such transactions, as and when the Association became satisfied, on the basis of its on-site inspections, that the value of the work and material incorporated in and stored at the job site justified the disbursement sought. The trial court, stating that "we have defined the issues narrowly in this case" (R. 563), repeatedly prevented petitioners from making that showing.

Specifically, the trial court prevented petitioners from establishing, by cross examining the Associations' vice-president with whom they dealt, that the "standard rule . . . for disbursement of those [escrow] funds" (R. 566) contemplated that draws would be made on the basis of the value of labor and materials incorporated in the work and of materials suitably stored at the site, as provided in the standard AIA form of contract between the contractor and owner (R. 922).

The trial court prevented Kovens from testifying that the Associations' vice-president with whom he dealt had told Kovens that "they were not concerned with any draws" and that the Association was satisfied with the progress of construction revealed by the Association's inspections made before the draws were approved (R. 636, 649, 650-51).

The court refused to permit petitioners to demonstrate a reasonable basis for their good faith belief that the construction draws were in order: that it is "a universal custom in this area, even now" (R. 579), for "loans of this same type and same category" to be disbursed on the basis of work and materials incorporated in the job and not only on the basis of paid bills (R. 579); that it was a common and accepted business practice in the Miami area, known to contractors and banking institutions as well, that subcontractors and materialmen customarily waive their liens on work for which they anticipate payment but for which they have not been paid (R. 310, 311); and that

> ". . . it is known by both sides that that does not mean that the bills, or the amounts indicated by the request on the construction draw and partial release of lien have in fact been paid prior to that time."
>
> R. 581.

At the instance of the Government, the trial court prevented petitioners from showing that, at the time each draw was submitted, the contractor had expended in the project an amount exceeding the amount of money sought to be drawn (R. 486, 678).

Although petitioners never conceded that the construction draws were intended to represent that particular sums had been paid to particular subcontractors for particular work incorporated in the project, petitioners sought to show that they gave one of the subcontractors a promissory note in payment for paving work done on the job (R. 651). The trial judge decided as a matter of law that the note could not constitute payment within the assumed meaning of the statement assumed to have been made by the construction draw, and so excluded the note from evidence and instructed the jury to disregard the testimony that the note had been given (R. 660-61).

At the conclusion of the case, over objection by petitioners (R. 794-95), the trial judge instructed the jury as follows:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done by the accused."
>
> R. 786.

Upon their conviction, petitioners appealed to the court of appeals for the fifth circuit. That court affirmed the convictions and stated, with respect to the trial court's rulings excluding the evidence offered by petitioners to

show their good faith in dealing with the Association, that:

> "Proof which would be relevant on the issue of general fraud is not necessarily relevant on a determination of whether the statements here involved were in fact true or false. With this construction of the alleged offense in mind, we conclude that the trial court did not err in rejecting the testimony tendered by the appellants."
>
> 338 F. 2d at 617-18.

Reasons for Granting the Writ:

The court of appeals has effectively eliminated the element of criminal intent from the offense proscribed by Title 18 U.S.C. § 1014 and thus

(1) has decided an important federal question in a way that conflicts with the decision of this Court in *Morissette* v. *United States* (1952), 342 U. S. 246;

(2) has decided an important federal question in a way that conflicts with the decisions of other courts of appeals in *Smith* v. *United States* (6th Cir. 1956), 230 F. 2d 935; *Rhodes* v. *United States* (4th Cir. 1960), 282 F. 2d 59; and *United States* v. *Niro* (2d Cir. 1964), 338 F. 2d 439; and

(3) has sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

By the evidence that was excluded, petitioners sought to demonstrate that the arrangements made by the Association and the contractor for disbursement of the con-

struction escrow funds were not those that the Government insisted upon, imposing its own interpretation on the ambiguous language of a printed form of draw. Petitioners sought to demonstrate, at the very least that they honestly believed that the arrangements were other than as asserted by the Government and that they had a reasonable basis for their belief. In short, petitioners sought, by the evidence excluded, to demonstrate their good faith.

The court of appeals held that the issue in this criminal case was "whether the statements here involved were in fact true or false" (338 F. 2d 617-18) and accepted, as a premise, that the construction draws were intended by petitioners and were understood by the Association as making the representations attributed to them by the Government. And the court of appeals approved the ruling of the district court which prevented petitioners from showing the contrary.

The decisions of the district court and of the court of appeals in this case are strikingly similar to the decisions of the lower courts which were reversed by this Court in *Morissette* v. *United States* (1952), 342 U.S. 246. Morissette was accused of having knowingly and wilfully converted to his own use three tons of spent bomb casings, the property of the United States, in violation of Title 18 U.S.C. § 641. He claimed he thought the casings were cast-off and abandoned and sought to have the jury consider whether he acted in good faith. Evidence was admitted that would have supported a finding that "the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk" (342 U.S. at 276), but the trial court held that Morissette could not show he thought the property was abandoned and that the jury could not conclude that he did.

Reversing, this Court noted that the terms of the statute required that the forbidden act be committed "knowingly" but not that it be committed "wilfully," and held that

> "mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced."
>
> 342 U.S. at 263.

Furthermore, this Court held:

> "The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative."
>
> 342 U.S. at 263.

This Court concluded that Congress had not affirmatively dictated an elimination of the element of criminal intent from the offense with which Morissette was charged, and reversed the conviction.

In this case, as in *Morissette*, the district court and the court of appeals held, upon an indictment charging that the accused acted wilfully and knowingly in violation of a statute which in terms proscribes only those acts that are done knowingly, that the issue to be decided by the jury is whether the act was done. Petitioners sought to show that the statements attributed to them were neither intended by them nor understood by the Association as having the meaning attributed to them by the Government. Yet, the court of appeals held that this evidence was

> "not necessarily relevant on a determination of whether the statements here involved were in fact true or false."
>
> 338 F. 2d 617-18.

The courts below have, in effect, read out of section 1014 the element of criminal intent. The strictures imposed on the defense in this case were calculated to and did strip petitioners of the benefit they were entitled to from innocence of evil purpose and circumscribed the freedom that the jury was entitled to exercise. The case was tried in a partial vacuum, in which the court allowed little elucidation of the events in question independent of the documents. Thereby the prosecutor was enabled to construe the documents as it pleased him to construe them and, on erroneous inferences extracted from those documents, to demand that petitioners be convicted upon an wholly imaginary scheme to deceive and cheat the Association. The conviction was virtually assured when, after refusing to permit petitioners to show the truth about what they did intend, the trial court instructed the jury that,

> "unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done by the accused."
>
> R. 786.

By instructing the jury as he did, after preventing petitioners from showing the wholly reasonable and innocent basis for their handling of the construction draws, the court effectively required the jury to accept the prosecutor's view

of the facts. In this way, too, the trial judge departed from the principle announced by this Court in *Morissette*:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reason are well stated by Judge Andrews in People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270, 11 L.R.A. 807; 'It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system, (unless in exceptional cases,) both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. * * *'
>
> "It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . .
>
> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the

> jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. . . .
>
> "Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'Did he intend to take the property?' That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances."
>
> 342 U.S. at 274-76.

The court of appeals for the fifth circuit had previously recognized, in *Mann* v. *United States* (5th Cir. 1963), 319 F. 2d 404, that it is improper, in a case in which a showing of criminal intent of a specific character is required for conviction, to charge the jury that, "unless the contrary appears from the evidence," the jury could infer that the accused intended the natural and probable consequences of acts knowingly done. Yet in this case, the court of appeals condoned the giving of that instruction.

The decision below conflicts not only with this Court's prior decision in *Morissette* but also with the decision of

the court of appeals for the sixth circuit in *Smith* v. *United States* (6th Cir. 1956), 230 F. 2d 935, in which the court reversed convictions for violations of Title 18 U.S.C. § 1010, for knowingly making false statements in applications for Federal Housing Administration loans. In that case, in which the defendant signed a loan application reciting that the loan proceeds be used for the addition of a room and the installation of an attic fan, the trial judge instructed the jury that the defendant should be convicted if at the time he signed the application he knew the proceeds would be used, instead, for payment of other outstanding loans and obligations. Reversing, the court stated:

> "This particular part of the instruction ignored the element of criminal motive and guilty mind. It took no account of the fact, undisputed, that a bank official in charge of FHA loans had told Troy Smith a loan could properly be secured under the FHA statute to pay for improvements already completed, that is, for existing debts."
>
> 230 F. 2d at 938.

The decision below conflicts also with the decision of the Court of Appeals for the Fourth Circuit in *Rhodes* v. *United States* (4th Cir. 1960), 282 F. 2d 59 (a prosecution for a purported violation of section 1014 of Title 18), in which the Court held that:

> "An intent beyond the mere doing of the act is not invariably required. Where, however, it is inherent in the offense, or the statute creating it prescribes as part of the definition that a specific state of mind shall accompany the act, as this statute does, a full exposition of the pertinent evidence is permitted if properly tendered."
>
> 282 F. 2d at 60.

The decision below conflicts also with the decision of the court of appeals for the second circuit in *United States* v. *Niro* (2d Cir. 1964), 338 F. 2d 439 (a prosecution for a purported violation of section 1014 of Title 18), in which that court, speaking of the same section of the criminal code as is here involved, stated that

> "The words 'for the purpose of influencing' were included in the statute to define the quality of the required intent. . . ."
>
> 338 F. 2d at 441.

and approved the trial court's instruction that

> " 'To act "for the purpose of influencing" means to act knowingly and with the specific intent to mislead, deceive, or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.' "
>
> 338 F. 2d at 440, note 2.

In *Kay* v. *United States* (1938), 303 U. S. 1, speaking of former Title 12 U.S.C. § 1467 (now incorporated in section 1014 of Title 18), this Court held it to be the purpose of that statute "to require that the information be given in good faith and not falsely with intent to mislead." 303 U. S. at 6.

It has thus been made certain, not only by the language of section 1014 itself but also by the decisions of this Court and of other courts of appeals, that the statute under which petitioners have been convicted is not one of those special statutes referred to in *Morissette* which forbid the mere doing of an act, which do not "specify intent as a necessary element," and which impose "relatively small" penalties for "neglect where the law re-

quires care, or inaction where it imposes a duty." 342 U. S. 246, 255-56.

The Government did not contend in this case that it was unnecessary to allege and prove that petitioners acted with criminal intent. By its indictment the Government charged that petitioners acted "knowingly and willfully" and "for the purpose of influencing" the Association (R. 4 *et seq.*). The whole thrust of the prosecutor's argument to the jury was that petitioners undertook, by means of the false statements in the construction draws, to deceive the Association and to induce the Association to disburse funds that the contractor was not entitled to (R. 733-37, 764-72). The prosecutor entreated the jury to "stop this sort of thing and protect Savings Association depositors" (R. 737).

These convictions were obtained because the Government was successful in its assertion, made plausible by an wholly inadequate revelation of the circumstances surrounding the transaction, that petitioners acted dishonestly toward the Association. By refusing to permit petitioners to show that they dealt in good faith with the Association and in strict accordance with what they believed was the true understanding between the parties and by instructing the jury that, "unless the contrary appears from the evidence," the jury might infer that petitioners intended all the consequences of their acts (R. 768), the trial court read out of section 1014 the explicit and historic requirement that the accused have acted for the forbidden purpose and with criminal intent. The court of appeals, holding that

> "Proof which would be relevant on the issue of general fraud is not necessarily relevant on a deter-

> mination of whether the statements here involved were in fact true or false."
>
> 338 F. 2d at 617-18,

made virtually conclusive the presumption of guilt which the trial court invited the jury to indulge.

Respectfully submitted,

W. G. WARD
1240 duPont Building
Miami 32, Florida
Attorney for Petitioner Kovens

IRWIN J. BLOCK
11th Floor Dade Federal Building
Miami 32, Florida
Attorney for Petitioner Cohen

CHESTER BEDELL
1520 Barnett National Bank Building
Jacksonville, Florida 32202
Attorney for Petitioners

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